UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE NICHOLAS TSOUCALAS, SENIOR JUDGE

GLOBE METALLURGICAL INC., **Plaintiff,** **v.** **UNITED STATES,** **Defendant.**	**Court No. 07-00022**

ORDER

Upon the Court's review of Plaintiff's Motion for Stay and Opposition to Defendant's Motion to Dismiss for Failure to State a Claim, and all other papers submitted, it is hereby

ORDERED that this action is stayed until a final and conclusive decision is issued in Court No. 07-00011; and Defendant's Motion to Dismiss for Failure to State a Claim is denied.

SO ORDERED:

Dated: _____
New York, New York

_____
Nicholas Tsoucalas, Senior Judge

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE NICHOLAS TSOUCALAS, SENIOR JUDGE

GLOBE METALLURGICAL INC., **Plaintiff,** **v.** **UNITED STATES,** **Defendant.**	**Court No. 07-00022**

PLAINTIFF'S MOTION FOR STAY AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Pursuant to Rule 7(f) of the Rules of the United States Court of International Trade and the April 5, 2007 scheduling order in this action, Plaintiff Globe Metallurgical Inc. ("Globe") respectfully moves the Court to stay further litigation of this appeal until a final and conclusive decision is issued in a related appeal before this Court (Ct. No. 07-00011). In addition, pursuant to Rule 7(d) and the scheduling order, Globe opposes the Government's March 19, 2007 motion to dismiss for failure to state a claim. Motion to Dismiss, Ct. No. 07-00022 (March 19, 2007).

QUESTIONS PRESENTED

In this case, the Department of Commerce (the "Department") revoked the antidumping duty order on silicon metal from Brazil based on a finding by the U.S. International Trade Commission (the "Commission") that revocation of the order would not likely lead to continuation or recurrence of material injury to the domestic silicon metal industry within a

reasonably foreseeable time. *Silicon Metal from Brazil: Revocation of Antidumping Duty Order*, 71 Fed. Reg. 76,635 (December 21, 2006) ("*Revocation Determination*"); *Silicon Metal From Brazil and China*, 71 Fed. Reg. 71,554 (December 11, 2006) ("*Commission Determination*"). In Court No. 07-00011, Globe has appealed the *Commission Determination*.

The questions presented by this motion for stay and the Government's motion to dismiss are:

- whether the Court should stay this appeal pending completion of Globe's related appeal of the *Commission Determination*, where the only issue in this appeal – whether the order was properly revoked – will be conclusively resolved by the related appeal;

- whether the Court should dismiss this appeal for failure to state a claim where, for the purpose of such a motion, the Court is to presume that all facts alleged by Globe are true and Globe has alleged that the *Commission Determination* contains errors that, if corrected, would result in a finding of likelihood of continuation or recurrence of material injury and require reinstatement of the order;

- whether the Court should dismiss this appeal for failure to state a claim if it was necessary for Globe to file the appeal in order to preserve this Court's ability to order reinstatement of the order;

- whether, if filing this appeal was not necessary to preserve this Court's ability to order reinstatement of the order, this Court should issue a declaratory judgment to that effect.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

On January 3, 2006, the Commission published a notice of institution of a five-year ("sunset") review of the antidumping duty order on silicon metal from Brazil. *Silicon Metal from Brazil and China: Institution of Five-Year Reviews Concerning the Antidumping Duty Orders on Silicon Metal from Brazil and China*, 71 Fed. Reg. 138 (January 3, 2006).

On December 11, 2006, the Commission published its determination that revocation of the antidumping duty order on silicon metal from Brazil would not likely lead to continuation or recurrence of material injury within a reasonably foreseeable time. *Commission Determination*, 71 Fed. Reg. 71,554.

On December 21, 2006, as a result of the Commission's negative sunset review determination, the Department published its notice of revocation of the antidumping duty order on silicon metal from Brazil. *Revocation Determination*, 71 Fed. Reg. 76,635.

On January 8 and February 8, 2007, respectively, Globe filed a summons and complaint challenging the *Commission Determination*.

On January 19, 2007, Globe filed a summons and complaint in the instant action challenging the Department's *Revocation Determination*. Complaint, Court No. 07-00022 (January 19, 2007) ("*Complaint*").

SUMMARY OF ARGUMENT

The Department revoked the order on silicon metal from Brazil based on the determination by the Commission that revocation of the order would not likely lead to continuation or recurrence of material injury within a reasonably foreseeable time. Globe appealed the *Commission Determination*, which is before this Court in Ct. No. 07-00011.

Globe filed this action challenging the Department's *Revocation Determination* because Globe is concerned that parties may argue, and the Court might find, that in order to preserve its right to obtain reinstatement of the antidumping duty order and for the Court to order reinstatement if necessary, Globe was required to challenge the *Revocation Determination*.

While the Court could choose to resolve this issue, Globe submits that the best alternative would be to stay this appeal until there is a final decision in Globe's related appeal of the *Commission Determination*. The only issue in this appeal – whether the antidumping duty order was properly revoked – will be conclusively resolved by the related appeal.

The Court should deny the Government's motion to dismiss for failure to state a claim. The Government concedes that for the purpose of such a motion, all undisputed facts alleged in the complaint are presumed to be true. In its complaint, Globe has alleged that it has

sought review of errors in the *Commission Determination*, that if corrected, Globe believes will result in a finding of likely continuation or recurrence of material injury to the domestic industry. For purposes of the motion to dismiss, the Court is to presume that this allegation is true. In these circumstances, revocation would be improper. Thus, Globe has stated a claim on which relief may be granted.

Further, the Court should not grant the motion to dismiss if (as the Government argued was true in another case involving a similar situation), the appeal is necessary for Globe to challenge the Department's *Revocation Determination* and preserve its ability to obtain reinstatement of the order. Dismissing this appeal in those circumstances would deny Globe its right to judicial review of the revocation of the order and clearly be inequitable.

If the Court decides that it was not necessary for Globe to file this appeal to preserve the Court's ability to order reinstatement, it should issue a declaratory judgment to that effect.

ARGUMENT

I. THE COURT SHOULD STAY THIS APPEAL

It is well established that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Neenah Foundry v. United States*, 2000 Ct. Intl. Trade LEXIS 36, slip op. 2000-33 (Ct. Int'l Trade 2000) (citing *Landis v. North American Co.*, 299 U.S. 248, 254, 81 L. Ed. 153, 57 S. Ct. 163 (1936)). "In the exercise of a sound discretion, {a court} may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same." *Id.*

The only issue before the Court in this case is whether the Department properly revoked the antidumping duty order on silicon metal from Brazil. The basis for Globe's

challenge to the Department's *Revocation Determination* is that the Commission erred in finding that revocation of order would not likely lead to continuation or recurrence of material injury within a reasonably foreseeable time. Thus, whether the Department properly revoked the order depends entirely on whether the Commission erred in finding no likelihood of continuation or recurrence of material injury, which will be resolved in Court No. 07-00011.

Further, the two parties involved in this appeal (Globe and the United States) are also involved in Court No. 07-00011. The United States would not be prejudiced or harmed by a stay. Rather, a stay would allow this action to go forward when appropriate and save resources for the Court, counsel and the parties.

This Court has stayed appeals pending the conclusion of a related appeal in similar situations, where resolution of the stayed appeal depended on the outcome of the related case before the Court. *See Elkem Metals Co. v. United States*, 135 F. Supp. 2d 1324, 1327-29 (Ct. Int'l Trade 2001) (noting that the Court had stayed plaintiffs' appeal of the Department's rescission of antidumping and countervailing duty orders until resolution of plaintiffs' related appeal of the negative Commission material injury determinations on reconsideration, on which the Department's rescission had been based). *See also Tak Yuen Corp. v. United States*, 2005 Ct. Intl. Trade LEXIS 62 at *3 to *4; slip op. 2005-60 (May 20, 2005) (noting that in an appeal brought by plaintiffs challenging the final results of a Department administrative review on the ground that their merchandise was not covered by the order, the Court stayed the appeal pending resolution of plaintiffs' related appeal of the Department's determination that the merchandise was covered by the order).

In fact, this Court has granted stays pending the outcome of related appeals even where the related appeals would not be dispositive of the stayed appeals, if a stay potentially could narrow the issues or otherwise conserve judicial resources. *An Giang v. United States*, 350

F. Supp. 2d 1162, 1168 (Ct. Int'l Trade 2004) (stating that a stay is appropriate "even where the 'lead' case may, at most, streamline the issues in the case sought to be stayed"). *See also CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (in evaluating request for stay, the court is to weigh the potential effect on "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.").

Here, resolution of the related appeal before this Court (Ct. No. 07-00011) will resolve the only issue presented by this appeal – whether the order was properly revoked. Thus, granting a stay of this appeal would allow this Court to decide the two appeals in an orderly manner that conserves judicial resources.

This Court also has recognized that "'the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward' with litigation (*i.e.*, a 'strong showing' of need for a stay) only where 'there is . . . a fair possibility that the stay . . . will work damage to someone else.'" *An Giang*, 350 F. Supp. 2d at 1164, citing *Landis, 99* U.S. at 255, 81 L. Ed. 153, 57 S. Ct. 163.

Here, granting a stay would be a means to avoid potential hardship and inequity to Globe. As explained more fully below, the Government seeks to dismiss the appeal in circumstances where parties could argue, and the Court might find, that the appeal is necessary to preserve Globe's ability to obtain reinstatement of the order. If the appeal is in fact necessary for this purpose, dismissing the appeal or issuing final judgment before resolution of the related appeal would cause a clear hardship or inequity to Globe, by denying its right to judicial review of revocation of the order. Granting a stay would be an appropriate mechanism to avoid that harm.

Further, in its motion, the Government identifies no harm to it that would justify dismissing this action before resolution of the related appeal before this Court. If this appeal is stayed, the Government will not have to take any action with respect to the appeal unless and until completion of the related appeal.

For all of these reasons, the Court should stay this appeal until a final and conclusive decision in Court No. 07-00011.

II. GLOBE HAS STATED A CLAIM ON WHICH RELIEF MAY BE GRANTED

Under section 751(d)(2)(B) of the Tariff Act of 1930, as amended, the Department is to revoke an antidumping duty order unless "the Commission makes a determination that material injury would be likely to continue or recur" if the order were revoked, as described in section 752(a).[1] Under section 752(a), the Commission is to determine whether revocation of an order . . . would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time."[2]

Thus, revocation of an order is only proper based on a Commission determination, supported by substantial evidence and in accordance with law, that revoking the order would not likely lead to continuation or recurrence of material injury within a reasonably foreseeable time.

In its motion, the Government concedes that "{f}or purposes of this motion to dismiss based upon failure to state a claim, all undisputed facts alleged in the complaint are presumed to be true and all reasonable inferences are drawn in Globe's favor." Motion to Dismiss at 1 (citing *Henke v. United States*, 60 F. 3d 795, 797 (Fed. Cir. 1995). In its complaint in this appeal, Globe states that it is seeking judicial review of the *Commission Determination* and has identified "errors that, if corrected, Plaintiff believes will result in a finding of likely

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[1] 19 U.S.C. § 1675(d)(2)(B).

[2] *Id.*, § 1675a(a).

continuation or recurrence of material injury to an industry in the United States." Complaint at ¶¶ 19-22.[3]

For purposes of the motion to dismiss, the Court is required to presume that this is true, *i.e.*, that Globe has identified errors in its related appeal of the *Commission Determination* that, if corrected, will result in a finding of likely continuation or recurrence of material injury to the domestic industry. Further, as the Government concedes in its motion, in those circumstances, revocation would be improper. Motion to Dismiss at 6 (acknowledging that revocation would not be in accordance with 19 U.S.C. § 1675(d)(2) where there is a finding of likely continuation or recurrence of material injury to the domestic industry). Therefore, Globe has stated a claim upon which relief may be granted.

In its motion, the Government argues that "whether Globe will prevail in obtaining a final and conclusive judgment that results in an ITC determination that injury is likely to continue or recur is speculative." Motion to Dismiss at 6 (emphasis added). However, under the applicable standard here, the question is not whether plaintiff's factual allegations are likely to bear out. Rather, the Court is to presume that the allegations are true and only dismiss for failure to state a claim if the ultimate relief sought in this appeal – reinstatement of the order based on a finding of likely continuation or recurrence of material injury – may not be granted. The Government does not even argue that is the case here.

III. GLOBE ONLY SEEKS TO PRESERVE ITS ABILITY TO OBTAIN REINSTATEMENT OF THE ORDER

In its motion, the Government argues that the Department "is not obligated to postpone revocation pending challenges in companion cases before the Court. Commerce

[3] If the Court believes that an even more explicit allegation is required, pursuant to Rule 15(a), Globe moves the Court for leave to amend its complaint to include such an allegation. Rule 15(a) provides that such motions "shall be freely given when justice so requires."

generally bases its revocation upon the information available to it at the time, and need not wait until appeals of related cases are final and complete." Motion to Dismiss at 6.

Globe has not asked the Department to "postpone" revocation (which has already occurred). Nor does Globe ask this Court to find that the revocation was improper unless and until, as a result of Globe's appeal of the *Commission Determination*, there is a finding of likely continuation or recurrence of material injury to the domestic industry. Globe filed the instant action to ensure that the Court can require reinstatement of the antidumping order after such a finding.

Specifically, Globe is concerned that parties may argue, and the Court might find, that in order to preserve its right to challenge the *Commission Determination* and, if the challenge is successful, to obtain reinstatement of the order, Globe was required to challenge the Department's *Revocation Determination*.

While Globe is unaware of any precedent involving the same factual situation as this case, in another context, this Court has stated that "{a} revocation determination becomes final when a litigant misses the statutory deadline for challenging that determination . . . ." *American Chain Association v. United States*, 746 F. Supp. 116 (Ct. Intl. Trade 1990). Although the case in question involved a different factual situation than the present one,[4] the quoted dicta indicate that if Globe had not appealed the Department's *Revocation Determination*, the revocation would have become final.

Further, in a case involving a similar situation, the Government argued that plaintiffs were required to appeal a Department revocation determination in order to preserve

[4] In *American Chain Association*, the Court found that once a revocation determination is final because it has not been challenged, outstanding challenges to administrative reviews covering time periods *after* the effective date of the final revocation determination are moot. Here, Globe has both challenged the *Revocation Determination* and the *Commission Determination*.

their right to judicial review of that determination and any failure to reinstate the order if the order was found to have been improperly revoked.[5] In that case, as in the instant appeal, the question whether revocation was proper depended on the outcome of a different, related appeal before the Court. The Government agreed with plaintiffs in that case that an appropriate alternative was for the Court to stay the proceedings or defer judgment pending final judgment in the related appeal.[6]

For these reasons, Globe filed the instant action to preserve its ability to obtain reinstatement of the order.[7] Globe then sought the Government's consent to a motion to stay the appeal pending the outcome of Globe's appeal of the *Commission Determination*. The Government declined to consent, stated that it would oppose a stay, and then subsequently filed its motion to dismiss.

In seeking to dismiss this action, the Government argues that

> Globe cannot establish, and does not allege, that Commerce would refrain from reinstating the antidumping duty order on silicon metal from Brazil upon notification from the ITC that the results of

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[5] Defendant's Response to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record, *Elkem Metals Co. v. United States*, Ct. No. 03-00020, at 9, 12 and 13 (December 1, 2003) ("Defendant's Brief in Ct. No. 03-00020") ("plaintiffs were required to appeal in order to prevent the revocation determination from taking effect, even though plaintiffs' challenge of the determination is predicated upon the outcome of the Court's review of a prior determination"), attached as Exhibit.

[6] *Id.* at 12-14. The Government also asked the Court to affirm the revocation, without identifying any mechanism (other than the appeal in question) by which the Court could order reinstatement, if necessary. *Id.* at 10-12. The Court did not do so in that case.

[7] The only other way Globe might conceivably take action to seek reinstatement would be through a separate suit brought pursuant to the Court's residual jurisdiction set forth at 28 U.S.C § 1581(i). However, it is well established that the Court's residual jurisdiction "'may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate.'" *Nissei Sangyo America v. U.S.*, 2003 Ct. Intl. Trade LEXIS 103, slip op. 2003-105 (August 18, 2003) (citing *Consol. Bearings Co. v. U.S.*, 166 F. Supp. 2d 580, 583 (Ct. Int'l Trade 2001)) (internal citation omitted).

> the ITC's sunset review had changed to a determination that injury was likely to continue or recur.
>
> In such a circumstance, Commerce would be obligated, as a legal matter, to reinstate the order because the revocation would no longer be in accordance with 19 U.S.C. § 1675(d)(2).

Motion to Dismiss at 6.

First of all, as noted above, in another case involving a similar situation, the Government argued that plaintiffs were required to appeal the Department's revocation determination in order to preserve their right to judicial review of the revocation and any failure to reinstate the order. Thus, the Government is asking this Court to dismiss an appeal when in a similar situation it argued that such an appeal was necessary to preserve the right to obtain reinstatement.

If this appeal in fact is necessary for Globe to preserve its right to reinstatement of the order and to maintain the Court's ability to order reinstatement if necessary (which the Court would have to resolve), it would constitute an improper denial of the right to judicial review for the Court to dismiss Globe's appeal for failure to state a claim as argued by the Government.

Second, regardless of the Government's position now, there is no assurance that the Department will reinstate the order (or do so on a timely basis) if there is a finding of likely continuation or recurrence of material injury as a result of Globe's appeal of the *Commission Determination*. Globe reasonably seeks to preserve its ability to ask the Court to order reinstatement if that becomes necessary.

Third, even if the Department agreed to reinstate the order, other parties could challenge any such reinstatement if there is no pending appeal of the revocation determination. While Globe believes such arguments would be wrong, the potential need for the Court to

address such arguments can be avoided by granting a stay or taking some other action to preserve the Court's ability to order reinstatement of the order if necessary.[8]

If the Court finds that it was not necessary for Globe to file this appeal to preserve its ability to obtain reinstatement, because the Court can order reinstatement in Globe's appeal of the *Commission Determination* or for some other reason identified by the Court, then Globe requests that the Court issue a declaratory judgment to that effect. In carrying out its review authority under the statute, the Court has the power to "order any other form of relief that is appropriate in a civil action, including, but not limited to declaratory judgments . . . ." 28 U.S.C. § 2643(c)(1). *See also Heartland By-Products v. U.S.*, 223 F. Supp. 2d 1317 (Ct. Int'l Trade 2002); *Kemira Fibres Oy v. U.S.*, 861 F. Supp. 144 (Ct. Int'l Trade 1994).[9]

IV. CONCLUSION

For the reasons set forth above, Globe respectfully requests that the Court grant its motion for a stay and deny the Government's motion to dismiss for failure to state a claim.

Respectfully submitted,

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[8] As stated above, Globe believes that the best approach would be to grant a stay.

[9] The statute states that "{i}n any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the {Act, 19 U.S.C. § 1516a(f)(10)}), as determined by the {Department}, the Court of International Trade may not order declaratory relief." 28 U.S.C. § 2643(c)(5). Brazil is not such a free trade area country.

EXHIBIT

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE GREGORY W. CARMAN, CHIEF JUDGE

ELKEM METALS COMPANY and GLOBE METALLURGICAL INC.,	)	
Plaintiffs,	)	
v.	)	Court No. 03-00020
UNITED STATES,	)	
Defendant,	)	
and	)	
RIMA INDUSTRIAL S/A, COMPANHIA BRASILEIRA CARBURETO DE CALCIO and COMPANHIA FERROLIGAS	)	
Defendant-Intervenors.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' RULE 56.2 MOTION FOR JUDGMENT UPON THE AGENCY RECORD

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December 1, 2003

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